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BETWEEN THE STATES OF

MARYLAND & VIRGINIA.

Before the Board of Arbitrators.

Synopsis of Argument made by Mr PINKNEY
WHYTE, of Counsel for Maryland.

August 26th. 1876.





Class F 137

Book 1

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Short notes of the argument of Mr. Whyte on behalf of Maryland.

Under the Act of 1876, Chap. 188, this Board of Arbitrators is vested with power so far as Maryland is concerned, (and Virginia hath done the like in her Act of Assembly,) "to ascertain and determine a true line of boundary between the States." The award to be final and conclusive: *Provided*, however, that neither the States nor the citizens thereof, shall, by such decision be deprived of any rights and privileges enumerated in the compact between the States, entered into in the year Seventeen Hundred and Eighty-five.

To ascertain that true boundary-line, you are possessed of all the functions of the Supreme Court of the United States, and in its determination, will you not be governed by the same general principles of law which that court would deem applicable to such cases?

The documentary evidence, furnished by the charters and other state papers; the joint action of the colonies; the legislative proceedings; long continued possession and exercise of jurisdiction; the conventions and compacts; and, *where these require secondary testimony*, then traditions or that kind of evidence, which is admissible *ex necessitate*, are the aids upon which reliance is to be made for just and reasonable conclusions.

The subject-matter of dispute can be best presented by considering :

1. Where is the true line on the Potomac?
2. Where the line should run from the western shore of the Chesapeake Bay to "Watkin's Point?"
3. And lastly, the line from Watkin's Point, east to the ocean?



PART I.

POTOMAC RIVER BOUNDARY.

Maryland claims under her original Charter, granted to Lord Baltimore by Charles I, and which passed the Great Seal, on the 20th June, 1632, that the line is on the south bank of the Potomac, running down to Cinquack, (now Smith's Point,) then by the *shortest line* to Watkin's Point on the eastern shore, and thence by a straight line, through Cedar Straits, to the ocean.

This is Maryland's claim *under the Charter*. This line will be shown to be modified by the subsequent action of the States.

For a proper understanding of the right of Maryland to the line, as claimed, it is necessary to review as briefly as possible, the circumstances, under which Lord Baltimore obtained the grant of Maryland. In the language of Mr. Justice McLean, in the Mass. and R. I. case, let me say, "that in looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood, at the time they transpired. There is no other test of truth and justice, which applies to the variable condition of all human concerns:" 4 Howard 629.

From the best histories; the following facts are drawn :

In 1606, King James I divided the territory, which had been previously covered by the grants to Gilbert and Sir Walter Raleigh, into two districts—the Northern, called North Virginia, extending from the mouth of the Hudson River to Newfoundland, was granted to the Plymouth Company; while the Southern, called South Virginia, extending from Cape Fear to the Potomac, was granted to the London Company.

The London Company planted a colony at Jamestown in 1607.

Robertson's History of Virginia, page 59; Smith's History of Virginia, Vol. 1, Book 3, Ch. 1, page 149; 1 Hazard's State Paper 50-58.

This Company had all the lands north and south of Cape Comfort, for 200 miles each way.

The London Company became divided in its Stockholders into two political parties, who, by their mismanagement and dissension aroused the King's ire.

Commissioners were appointed to examine into its affairs, and reported against it. A surrender of the charter was demanded and refused, whereupon proceedings were instituted by *quo warranto*, and the charters, which had become three in number, obtained in 1606, 1609 and again in 1611, were revoked in 1624, by the Court of King's bench: Robertson's America, p. 103; Rymer, Vol. 17, p. 618, &c; Hubbard's Rep., 28 Cong., 1st Session, p. 28, filed by Virginia's Counsel.

Stith in his history of Virginia, pp. 329, 330, doubts if this judgment ever passed; but Bancroft in a note to page 192 of his 1st Volume, of the history of U. S., says: "The doubts may be removed." Before the end of the same term a judgment was declared by the Lord Ch. J. Ley against the company and their charter, only on a failure or mistake in pleading."

See a "Short Collection of the most remarkable passages from the original to the dissolution of the Virginia Co.," London, 1651, p. 15; 1 Hazard 191; 1 Proud's Pennsylvania 107; 1 Story's Commentaries 27.

"The plantation no longer governed by a chartered company was become a royal province, and an object of favor:" 1 Bancroft 194.

The Supreme Court of the United States, in a case before it, declared the effect of this judgment was to *revert in the crown the powers of government, and the title to lands within its limits: Johnston vs. McIntosh*, 8 Wheaton 578.

Jefferson in his Notes on Virginia, p. 182, thus speaks of the

transition of the colony from the hands of the company back to the crown: "The king and the company quarrelled, and by a mixture of law and force, the latter were *ousted of all their rights*, without retribution, after having expended £100,000 in establishing the colony—without the smallest aid from government." "King James suspended their powers by proclamation of July 15, 1624, and Charles the First took the government into his own hands."

Thus the Virginia plantation having become a *royal province* with its ample limits, as defined in its charters, it was in the power of the king to grant such parts of its territory to individuals, and establish proprietary governments, where he pleased.

To fortify this view, I quote the language of the Supreme Court, in the case of *Howard et al. vs. Ingersoll et al.*, 13 Howard 400.

"It may be well here to say, that the power of the king to alter, change, enlarge or diminish the limits of his royal governments in America cannot be denied."

When, therefore, subsequently in 1632, the king granted the charter for the proprietary government of Maryland, to which fuller reference will be in a moment made, there could be no question, as to his authority to grant any part of the territory, covered by the annulled charters of the Virginia company. But while he could do this with a *royal province*, yet after he had granted and allowed the establishment of a *proprietary government*, he had no power to grant any part of the territory held under that proprietary government to any other persons or company; so that *so far as the limits of Maryland were abridged*, the "Hopton Grant," referred to by Virginia's counsel, was an absolute nullity. The following quotation from the last-named case, in the Supreme Court, settles that point.

Speaking of the kinds of government in America, the court adds, "They were royal and proprietary. In the former, the right of the soil and jurisdiction remained in the crown, and their boundaries, though described in letters patents, were subject to alteration at its pleasure." * * * *

"In proprietary governments, the right of the soil as well as

of jurisdiction were vested in the proprietors. These charters were in the nature of grants, *and their limits being fixed by these charters could not be altered, but by their consent.*"

The State of Maryland will not therefore, by its counsel, argue the portion of the case made by Virginia under the Hop-ton grant, as it is deemed not to have affected the bounds of Maryland in any way.

For reasons growing out of religious dissensions in 1621, Sir George Calvert, then one of the secretaries of state, contemplated a settlement of Catholics in America. Being in favor at Court, he obtained a special patent for the southern promontory of Newfoundland.

It is fairly inferrible from the accounts of that time, that he was anxious to obtain control of the fisheries: see Chalmers's Annals 84, 100, 114, 115, 116, 130.

In 1628 we find him opposing, by counsel, in the House of Commons, by permission, the bill for a freer liberty of fishing, because deemed by him subversive of his right, under the grant of this territory in Newfoundland: Chalmers, p. 201.

That the value of the fisheries at that period was very highly estimated is clear, and that the obtaining of a large part of this trade was the objective point with Lord Baltimore can hardly be doubted.

Captain Smith remarks, in his book, that according to Whitborne's "Discovery of Newfoundland," the banks and coasts of that region were visited by 250 sail of English fishermen annually: Smith's Hist. vol. 2, p. 246, Richmond edition.

After an earnest effort to make a settlement, and indeed after several naval encounters on that coast with the French fishermen, he gave up all hopes of establishing a prosperous colony in Avalon, and returned to England.

His subsequent visit to the colony of Virginia, his inability to take the oath of supremacy, and his return again to England, and his effort to obtain a grant of Maryland, are all well known and referred to in the papers in this case.

It seems apparent, however, that he still longed for the control of the waters and the profitable enjoyment of the fisheries, and so he looked to the waters of the Chesapeake Bay and the Potomac and the Wigheo and other rivers, tributary to that Bay, and sought to cover them by the grant he solicited from the Crown.

At this period, the only settlements made in New England, under the Plymouth Company, were at Plymouth and Massachusetts Bay. The consent of the King was obtained by the first Lord Baltimore for the grant, but before the patent could be finally adjusted and pass the Great Seal, Sir George Calvert died, and the charter was published and confirmed subsequently for his son, Cecil Calvert: 1 Chalmers 201; 1 Bancroft 244; 1 Bozman's Hist. of Md. 271.

The remonstrance of Virginia against the issue of the charter, through her commissioners in England was in vain, for, by the efforts of Strafford, the privy council sustained the proprietary charter.

The *original record* of the charter, seems to have been made in the Rolls' office on parchment, on 20th June, 1632, in Latin, with the abbreviations common to that period. Although the effort has been made in some quarters to cast a shade over the correctness of the charter of Maryland, because of certain interlineations in a *copy* now to be found in the (colonial) State Paper office, it will be discovered on examination of the DeJarnette papers, filed in this case, Nos. 20 and 21, on pages 15 and 16 of "miscellaneous" documents, that the *original record* in the Rolls' Office, gives the patent in the abbreviated Latin, but the emendations referred to are found to be made in the *copy* of that record (to be found in the State Paper office, which purports to have been examined and corrected by the original, communicated by Mr. Beake from Lord Baltimore, July 5, 1723.) The two papers are entirely distinct, and the original record in the Rolls' office remains, as it was recorded in 1632.

Col. McDonald, the Virginia Commissioner, did not find in 1860 the *original charter*, as it passed the Great Seal, either in the Rolls' Office, the State Paper Office or in the British Museum, but he did find in the Rolls' Office the *record* of the *original charter*, and also a copy of the charter, as it remains in the State Paper Office, which "in 1723 was examined and corrected by the original to Lord Baltimore, under the Great Seal of England, which had been obtained from Lord Baltimore through Mr. Beak, as by the endorsement copied from said book will to be seen:" McDonald's Report, March 9, 1861, page 32; Virginia Reports of Boundary Line.

It will be observed therefore, that the *record* in the Rolls' office is enrolled with the Latin abbreviations, but it is the *copy* of that record in the State paper office, in which the emendations or extensions occur.

Within two years after this charter passed the Great Seal, that is in 1634, and then in 1635, there appeared in London, the "Relation of Maryland," which was subsequently used against Lord Baltimore in the Penn case, in which an English version of the charter appeared in these words, so far as the boundaries of the province are delineated, viz:

Copy from the "Relation," 1635, Sabin edition. "All that part of a peninsula lying in the parts of America between the ocean on the east, and the Bay of Chesapeake on the west, and divided from the other part thereof, by a right line drawn from the promontory or cape of land called Watkins Point, (situate in the aforesaid bay near the river of Wigheo,) on the west, into the main ocean on the east, and between that bound on the south unto that part of Delaware Bay on the north, which lieth under the fortieth degree of northerly latitude from the Equator, where New England ends, and all that tract of land between the bounds aforesaid, that is to say, passing from the aforesaid Bay, called Delaware Bay, in a right line by the degree aforesaid, unto the true meridian of the first fountain of the River of Potowmack, and from thence trending toward the south unto the further bank of the aforesaid river, and following the west and south

sides thereof unto a certain place called Cinquack, situate near the mouth of the said river where it falls into the bay of Chesapeake and from thence by a straight line unto the aforesaid promontory and place called Watkins Point, (so that all that tract of land divided by the line aforesaid, drawn between the main ocean and Watkins Point, unto the promontory called Cape Charles and all its appurtenances, do remain entirely excepted to us, our heirs and successors forever.

In McMahon's, Md., page 1, almost the same words are used in the translation of the Latin charter, except that in describing the line across the bay, these words are, "And thence by the *shortest line* unto the aforesaid place or promontory, called Watkins Point."

And subsequently at page 18, McMahon, speaking of this charter says, "in all the grants of unexplored territory, made by the English Crown, at that day, there is not one so precise and definite in its terms, nor one which is less susceptible of misconstruction, than that of the province of Maryland."

These translations differ so little from that of Mr. Tomlins, (page 219, of the Maryland statement), as in my judgment to open no door for controversy, as to the actual meaning of the grantor in defining the bounds of his grant.

The following additional copies of the charter are also referred to, as sustaining the above translation.

Copy printed by John Basket, in 1723, contained in a book of acts of assembly of Maryland from 1692 to 1715.

Charters of Va. and Md., printed in London, in 1766, for the library of Harvard College, and similar to that in the "Relation," of 1635.

The charter in Bacon's laws of Maryland in 1765.

This copy is stated by Bacon to be printed from the "attested copy," taken in the year 1758, from the original record, remaining in the Chapel of the Rolls and signed by Henry Rooke, clerk of the Rolls, which was lent me by his Excellency Horatio Sharpe, Esq., Governor of Md., from whence the same is transcribed."

Of this copy, Chalmers in his annals, page 226, says:

“There is an excellent copy of the charter taken from the records in the Chapel of the Rolls, annexed to Bacon’s laws of the province.” There is a copy also in the Maryland Ent. Plant. Office, I. V., page 1.

It is remarkable, therefore, that no exception was taken to the copy of the charter, published in the Relation of Maryland in 1634, only two years after its issuance. (See Shea’s reprints of Southern Tracts, No. 1.)

It is also very manifest, that the charter as recorded in 1632, remained in the Roll’s office in 1758, as copied by Bacon in 1765, notwithstanding the assertion that there was a corrected copy of it in the State paper office, which had been so corrected in 1723 by direction of Lord Baltimore. Reference is also here asked to: 1 Hazard’s St. Pap. 327 to 337; 2 Bozman’s History of Md., 9 to 21.

1780.

Chalmers in his annals published in ~~1776~~, thus speaks of this charter, “And that monarch in June, 1632, conferred on Cecilius, now baron of Baltimore, forever, that region bounded by a line, drawn from Watkin’s Point, on Chesapeake Bay to the ocean on the east, thence to that part of the estuary of Delaware on the north, which lieth under the 40th degree, where New England is terminated; thence in a right line by that degree aforesaid, to the meridian of the fountain of the Potomac, thence following its course, *by the farther bank* to its confluence: Chalmers, p. 202.

Story in his Commentaries on the Constitution, sec. 103, thus describes the bounds:

The territory was bounded by a right line drawn from Watkin’s Point on Chesapeake Bay, to the ocean on the east, thence to that part of the estuary of Delaware on the north, which lieth under the 40th degree, where New England is terminated, thence in a right line by the degree aforesaid, to the meridian of the fountain of the Potomac; thence following its course by the further bank to its confluence with the Chesapeake; and

thence to Watkin's Point: He gives, as authorities for this; 1 Hazard, 327 to 337; 1 Chalmer's 202; Charters of N. A. Provinces, 4 to , London, 1766.

Frost thus describes it: "He obtained from Charles the First the gift of an extensive region, which Virginia had fondly cherished as her own, extending from the *southern bank of the Potomac northwards* to the 40th degree of latitude, and thus including the upper part of the Bay of Chesapeake, and the whole of that of Delaware." Frost's Book of the Colonies, p. 131.

And to the comments on it in McMahon's Md. 133, 183, and Ogilby's America.

The title of Maryland being thus put upon the charter, it is proper to begin the examination of its southern boundary, first upon the line of the Potomac.

The Latin text of that boundary is in these words, viz.: "Transeundo â dicto estuario vocato Delawur Bay, rectâ lineâ per gradum prædictum usque ad verum Meridianum primi fontis fluminis de Pottowmack, deinde vergendo versus Meridiem, ad ulteriorem ripam et eam sequendo quâ plaga occidentalis et Meridionalis spectat, usque ad locum quendam appellatum Cinquæk."

Public Record Office. Copy, Patent Roll, 8 Charles the First, part 3, No. 5.

Certified, 24th May, 1871, by H. J. Sharpe,

Assistant Keeper of Public Records.

This copy reads:—

u Et eam sequendo qua plag occidental t meridional spectat,
usque adlocum quendam appellat Cinquæk ppe ejusdem fluminis
ostiam scituat ubi in pefat sinu de Chessopeak evolvit ac inde
p. lineam brevissimam usque ad pedem Promontor ~~sine~~ ^{34e} locum
vocat Watkin's Point."

This corresponds with the copy from the Rolls' Office, as furnished by Mr. Dejarnette, and is similar to that from which the "Tomlin's translation" is made.

See Md. Statement, p. 220 ; also DeJarnette's Boundary Line, Miscellaneous, p. 16.

It is impossible to doubt, that under this description the southern bounds of Maryland extended to the *south bank* of the Potomac. That "*ulteriorem ripam*" means the farther or southern bank is plain ; and that "*sequendo eam*," (the latter relating to and agreeing in gender with "*ripan*,") means, "*following that bank*," to Cinquaek, on the southern shore of the river, is really, with due respect to the opinion of others, scarcely open to disputation.

The effort at the translation of the Latin, made in the final report of the Virginia Commissioners to the Governor, January, 1874, will hardly add much scholarly fame to the translator. It is necessary to interpolate words to reach the desired result, and when attained, the conclusion is by no means a very sensible one.

How the "western shore looks towards the southern" (shore,) **U**nto a certain place called Cinquaek, passes comprehension. Such a translation is based upon the theory, that "*spectat*" should be "looks" in English, which, in some connections would be correct ; but when used in relation to localities the verb "*specto*" means "to be situate," or "to lie," and thus, according to my translation of that part of the charter, referring to the end of the line on the Potomac, the proper version would be this, viz. : "*Et eam sequendo, quâ plaga occidentalis et meridionalis spectat, usque ad locum quendam, appellatum Cinquaek prope ejusdem fluminis ostium scituatum, ubi in præfatum sinum de Chesapeake evolvitur,*" and "following it (the bank) to where the western and southern shore is situate (or lieth) as far as a certain place called Cinquaek, situate near the mouth of the same river, where it discharges itself into the aforesaid Bay of Chesapeake."

That the proper English word for "*spectat*" is used, can be seen by reference to Ainsworth's Latin and English Dictionary. A look at the map shows the western and southern shore at the mouth of the river to be the bank at "Smith's Point," or "Cinquaek," and the northern shore to be at Point Lookout.

In the case of the Great Falls' Manufacturing Co. against the U.S. in Montgomery County Court, Maryland, November Term 1858, Judge Brewer adopts the argument of the Counsel of the United States on this branch of that case, and says: "It was contended by the company, that the "bank" and "river" were synonymous, and that 'following the same' meant the river, on which the preceding line terminated; but it is evident the grant makes a distinction between them. If the word "same" could, in English grammatical construction refer to the "river" and not the "bank," the line might possibly run with the river, but a very ingenious criticism suggested by the Counsel for the United States, on the concordance of the words of the charter originally written in Latin, shows that the line was to follow the bank and not the river."

"The first line from the "head waters of the river "runs" *ad ulteriorem dicti fluminis ripam et eam sequendo*," to wit, "ripam" with which "*eam*" agrees in gender, and not "*flumen*" with which it could not agree; "*eam*" is feminine. "*flumen*" is neuter: See dictionary, see also Ross' Grammar, &c., &c.

"The termination of the line where the Southern and Western Shore is situate, is near the mouth of the river, and there the line terminates at the Chesapeake Bay, with a call for a "certain place, called Cinquack," on the south side of the River. Judge Brewer then concludes, "I think it is clear that Maryland 'ncluded within its chartered limits, not only the bed of the Potomac River to low-water mark on the further side, but to the bank beyond, excluding the possession of any riparian rights of the State of Virginia." This conclusion of Judge Brewer is sustainable upon the clearest principles of law.

The first call of the line on the river is for a point on the Southern bank, and the last call is also for a place on the same bank, distinctly defined below the mouth of the river. This indicates the plain intent to give the whole of the Potomac River to the proprietary of Maryland, and to confine the Royal Colony of Virginia to the southern "bank."

There was a manifest distinction between the case, relating to the territory north-west of the Ohio, referred to by the Virginia Counsel, as *Handley's Lessee vs. Anthony*, 5 Wheaton 379, and the case of Georgia, cited as *Howard and others vs. Ingersoll, et al.*, 13 Howard 400; for in the latter case, the call was for the "bank" of the river, and restricted the limits of the ceded territory to the western bank of the Chattahooche River.

Or to state the matter more fully.

In *Handley's Lessee vs. Anthony*, it was not the *bank* of the river but the *river* itself, at which the cession of Virginia commenced. She conveyed to Congress all her right to the territory situate, lying and being to the northwest of the Ohio River. And this territory, according to express stipulation, is to be laid off into independent states.

These states then are to have the river itself, wherever that may be, for their boundary.

Where a great river is the boundary between two nations or states, if the original property is in neither, and there is no convention respecting it, each holds to the middle of the stream. But when, as in the case of the northwest territory, one state is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only; the river, however, is the boundary. Affirmed in *Howard vs. Ingersoll*, 13 How. 412.

When Georgia ceded to the United States, all the land situated on the west of a line running along the *western bank* of the Chattahooche river, she retained the bed of the river and all the land to the east of the line above mentioned.

The river flows in a channel between the two banks, from 15 to 20 feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores from thirty to sixty yards each in width.

The boundary-line runs along the top of the high western bank, leaving the bed of the river and the western shore within the jurisdiction of Georgia: *Howard vs. Ingersoll*, 13 How. 381.

Binney's case, 2 Bland's Chancery Report, 127, is also cited,

as showing the construction of Chancellor Bland, given to the charter in the determination of certain claims to water-rights, and after stating the bounds of the states, he adds :

“To the full extent of this call for the right bank of the Potomac, Maryland has always held, and under that holding all the islands in the river have been granted by patent from the Land Office, or by legislative enactments or titles derived from this state.”

The Attorney General of Va., says that Maryland never asserted her claim to the Potomac; she did so as a colony, and she did it in plain terms afterwards as a state: Doc's, West and South Bdy pages 6 & 9.

The limits of Maryland must have been well considered and its lines distinctly laid out upon information, as accurate as it was possible at that date to obtain.

The Potomac river had been described by Smith in his History of Virginia: 2 Book, page 118; as “navigable for 140 miles.” Then naming the tribes inhabiting the banks, after describing the Wigheocomicos at the very entrance on the south side, and giving accounts of others, he says: “Here the river divides itself into three or four convenient branches. The greater of the least is called Quiriough, trending northwest, but the river itself turneth northeast and is still a navigable stream.” And then, speaking of the map, accompanying his history, he states:

“What I did with these small means, I leave the reader to judge, and the map I made of the Country, which is but a small matter in regard to the magnitude thereof:” Book 2, p. 119.

McMahon in his History, also remarks in a note, that these bounds were evidently framed from a Map, accompanying “Smith's History of Virginia,” and he adds, as to the map, “which, as to the Bay (Chesapeake) and the country adjacent to it and the mouth of its tributary streams, even to the mouth of the Susquehanna, may safely challenge a comparison in point of accuracy, with the maps of this day.”

Says Grahame, “With prodigious labor and extreme peril he visited every inlet and bay on both sides of the Chesapeake,

from Cape Charles to the river Susquehanna: he sailed up many of the great rivers to their falls and diligently examined the successive territories into which he penetrated, and the various tribes that possessed them. He brought back with him an account so ample and a plan so accurate of that great part of the American Continent now comprehended in the provinces of Virginia and Maryland, that all subsequent researches, which it has undergone have only expanded and illustrated his original view, and his map has been made the groundwork of all posterior delineations with no other diversity than what has inevitably arisen from the varieties of appropriation and the progress of the settlements: Hist. of U. S. from the Plantations of the British Colonies to the revolt. J. Grahame, vol. 1, page 47.

Robertson also speaks of this Map, at page 72 of his History of America, in this manner: "His Map exhibits no inaccurate view of both countries (Va. and Md.), and is the original on which all subsequent delineations have been formed."

This map was used in laying out the bounds of the province: 1 Boz. 107.

That the line on the Potomac was well understood, at the time the charter was granted, is clear from the description in the "Relation" published in 1634, and continued to be so understood as late as 1678, appears from the answers of Lord Baltimore, to the questions of the Lords of the Committee on Trades and Plantations, 26 March, 1678, wherein he says, that the boundaries, longitude and latitude of this province are well defined and set forth in Hermann's map. (The Va. statement 219 and 221; The map itself, 1670, A.)

The map in Oglesby's America, is the same as that among the collection of Virginia's maps, called "Nova Terre Mariæ Tabula," and the bounds of Maryland, as set out, on page 184 of the history, are here referred to.

The counsel for Virginia very truly say, that it is essential for us to maintain that the *south bank* of the Potomac River was our southern boundary under the charter, so that the line across the Chesapeake Bay to Watkin's Point, may start from Cinquack or Smith's Point; we have so maintained, and we have

heard nothing to justify any departure from that location, as the starting point across the Bay. Nowhere can be found any real facts to justify the inference, that either Point Lookout or the centre of the stream (Potomac) ever was considered as the initial point of the line across to the eastern shore. On this branch of the case the charter is clear, and the remarks hereinbefore made about the grant to Lord Hopton and others, in our judgment, disposes of the theory, that, because Maryland finally yielded to the recognition of the Fairfax Stone, as fixing its western boundary, it abandoned the claim to the whole Potomac River.

It would be a waste of time here to enter into any details in reference to the various phases, which the controversy in regard to the territory in the northern neck of Virginia, from time to time, assumed; it is sufficient, however, to affirm that the proprietary of Maryland, down to the period of the Revolution, asserted his claim, continually, to the "first fountain of the Potomac *where ever that might be*:" McMahon 55.

When Virginia assumed her position as a Sovereign State, she did not hesitate to recognise the boundaries of Maryland, as defined in the charter to Lord Baltimore. So in the Constitution, adopted in June 26, 1776, there is a clear cession to Maryland, of all its right to the territory contained in its charter, notwithstanding any claim which Virginia might have previously set up, "except the free navigation of the Potomac "and Pocomoke, with the property of the Virginia shores or "strands *bordering on either of the said rivers*, and all improvements which have or will be made thereon."

The Declaration of Independence recognized the same bounds in the States, as they held as colonies.

The Constitution or Form of Government agreed upon by the Delegates and Representatives of the several counties and corporations of Virginia, (unanimously adopted June 29, 1776, "21. The territories contained within the charters erecting the Colonies of *Maryland*, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed to the people

of these Colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might at any time heretofore have been claimed by Virginia, except the free navigation of the Potomac and Pocomoke, with the property of the Virginia shores or strands, bordering on either of the said rivers, and all improvements which have or will be made thereon. The western and northern extent of Virginia shall in all other respects, stand as fixed by the charter of King James the first, in the year one thousand six hundred and nine, and by the public treaty of peace, between the Courts of Great Britain and France, in the year one thousand seven hundred and sixty-three; unless by Act of Legislature, one or more territories shall hereafter be laid off, and governments established westward of the Alleghany mountains. And no purchase of lands shall be made of the Indian natives, but on behalf of the public by authority of the General Assembly." See "Va. boundary line, Miscellaneous, p. 53." Here, then, was a clear recognition of the right of Maryland to the territorial limits claimed under the charter, and while the people of Maryland were in the midst of the struggle for freedom, they did not hesitate, formally by resolutions in their Convention, on the 30th day of October, 1776, to protest against Virginia's pretensions to jurisdiction even over the "shores and strands" on the southern side of the Potomac: see Doc's western and south boundary, p. 9.

And these territorial limits conceded in the constitution of Virginia of 1776 to Maryland, have been repeatedly recognized by its public acts: and in the latest edition of its Code, it there reaffirms them.

EXTRACT FROM CODE OF VA. OF 1873.

Title 1, Chapter 1, Territorial limits of Virginia and nature of the compacts with adjoining states.

Page 104. "And the people of Virginia, when they adopted their constitution or form of Government, on the 29th of June, 1776, having by the 21st section thereof, ceded, released and confirmed to the people of Maryland, Pennsylvania, North and

South Carolina, such parts of the territory of Virginia as were contained *within the charters erecting those colonies*, with all the rights in those parts, which might heretofore have been claimed by Virginia, except the free navigation of the rivers Potomac and Pocomoke, *with the property of the Virginia shore or strands* bordering on either of the said rivers, and all improvements thereon, and having at the same time laid down in the said section that the western and northern extent of Virginia should in all other respects stand as fixed by the said charter of James the First, granted in 1609, and by the said treaty of peace, between Great Britain and France in 1763, unless by act of the legislature, one or more territories should thereafter be laid off, and governments established westward of the Alleghany mountains. The General Assembly of Virginia doth hereby declare, that the territory of this commonwealth and the boundaries thereof, remain as they were after the said constitution was adopted on the 29th of June, 1776, except only as follows, that is to say:

Then follows "Territory west of Ohio, &c."

The line then ran to Cinquack.

There never was any difficulty as to the location of Cinquack. It is plainly marked on Smith's map, and Lord Baltimore's map in his "Relation," and properly described in the Virginia proclamation of Governor Harvey, of 1638, as being the great Wicomico River, and the starting place of the line across the Bay: Wise's Book, page 58 and 59; Proclamation 1638, page 15, Wise Book.

After this Constitutional recognition, in 1777, the very next year, negotiations began for the settlement of all questions that might arise in relation to the water-lines between the two states, and under the management of commissioners representing each State, at Mount Vernon, the compact of 1785 was entered into; George Mason was one of Virginia's commissioners, and no one better knew her rights or was more ready to maintain them: see page 53 of Virginia's boundary-line. Miscellaneous Pamphlets.

Here Smith's Point was substituted for Cinquack.

By that, "piracies, &c., committed on that part of Chesapeake Bay which lies within the limits of Virginia, or that part of said bay where the line of division from the *south point of Potomack River, (now called Smith's Point,) to Watkins Point,* "near the mouth of Pocomoke river, may be doubtful," or where the line of division between the two states upon the said river is doubtful, &c., are made punishable in a certain way, &c., &c.,

Thus, recognizing the south-western boundary of Maryland to be on the *southern shore of the Potomack, and running from the said south point of the Potomac river, (now called Smith's Point,) to Watkins Point.*

The people of Virginia conceded in this formal way, this line from Smith's Point to Watkins Point, in 1785. They have reiterated it again and again, in the various Codes published in 1849, 1860 and 1874. The following is the last enactment on the subject, viz:

Code of Virginia, 1873, page 110. "*Compact and boundary between Virginia and Maryland.*"

"Commissioners appointed by the General Assembly of the State of Maryland, and also of the State of Virginia, having met at Mount Vernon, in Virginia, on the twenty-eighth day of March, in the year seventeen hundred and eighty-five, and mutually agreed to a compact: 12 Hen., Stat. 50, 1 R. C., p. 53, C. 18; the said compact having been confirmed, first by the General Assembly of Maryland, and afterwards, on the 3rd day of January, 1786, by an Act of the General Assembly of Virginia, it is hereby declared, that the said compact remains obligatory, except so far as it may have been superseded by the provisions of the Constitution, since formed for the United States; and it shall be faithfully observed and kept by this government and all its citizens, so far as may not be incompatible with the said Constitution.

Amongst the articles of the said compact, are the following: "Seventh—The citizens of each State respectively, shall have full property in the shores of the Potowmack River, adjoining their lands, with all emoluments and advantages thereunto

belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states: provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other, &c., &c.

Though the commercial regulations set out in this compact were rendered nugatory by that clause in the Constitution of the United States, giving to Congress the power to regulate commerce between the states, yet the admission that there were given points between which the boundary-line ran, is binding on the States, unless denied by Congress.

It belongs to sovereignty to fix boundaries between their respective jurisdictions: and when fixed by compact, they become conclusive upon their citizens, and bind their rights. This power, though it can only be exercised with the consent of Congress, still resides with the several States: *Poole vs. Fleegey's Lessee*, 11 Peters 185.

In the absence of Congressional interference, can Virginia now repudiate that part of the compact of 1785, acknowledging Smith's Point as the starting point of the boundary-line across the Bay? We think not.

But, apart from the binding force of the compact of 1785, after this long continued admission or recognition of Maryland's right as far as the "shores or strands" on the southern side of the Potomac, lasting for nearly a whole century, how is it possible, at this late day, for Virginia to maintain a claim, either to the north bank of that river, or to the middle of the stream?

There cannot be found, we respectfully reiterate, in all the mass of papers, documents or historical extracts, anything to justify such pretensions.

The south bank of the Potomac at Cinquaek or Smith's Point, as agreed on in the Compact of 1785, and recognized

ever since, being the starting point across the Bay, the boundary runs by "the shortest line" to Watkin's Point. This is our line across the Bay.

PART II.

LINE OVER THE BAY.

Passing from the consideration of the line upon the Potomac, let us examine the southern boundary as *called for in the charter*.

This consists of two lines, both of them straight; the one being the *shortest line* from the place called Cinquack, near the mouth of the Potomac River, to the "promontory or place called Watkins Point," and the other from "Watkins Point," east to the ocean: Charter; Boundary; Miscellaneous, page 23.

Nothing whatever has been found in all the researches for information on this subject to show that the line across the bay, was ever definitely run and established, either by the concurrent action of the colonies, or subsequently by the states. So far as documentary evidence goes, there is not a tittle of evidence to be found indicating any such settlement. It is asserted, no such evidence can be found.

Upon the words of the charter, and upon the recognition by the States, of the *terminus a quo*, and the *terminus ad quem*, of the line across the bay, that is, Smith's Point, the point of departure, and Watkins Point, the point of arrival across the bay, it is for you to establish that line from the terms of the charter, and from the undisputed action of the States. It would belittle the great question to suppose, that the statements of fishermen and oystermen, even if proved by concurrent testimony, to be the accounts of old inhabitants, could set up and establish the division boundaries for great States in the absence of documentary evidence of some kind, to lay the foundation for such proof, by showing that some sort of line was run by the joint action of the States.

No reliance, therefore, is placed on any such testimony in the absence of proof, either that both or one of the States actually had such line run. But wherever action has been taken by the State, we shall be made liable to the effect of such action, as we shall see.

Whatever may have been the exact location of Cinquaek, (the initial point in the charter for the bay line,) is now immaterial, for as we have seen, Smith's Point under the terms of the Compact of 1785, and of the subsequent Acts of the Legislature has been recognized as the starting point for this line.

You have been already referred to the tenth article of the compact, and the legislation of the States, showing the line of division to be from the south point of Potomac River, now called Smith's Point to Watkin's Point: *Miehlers Instrs Ex. Docs.*, Rep. Bdy., p. 7.

We must start, therefore, from "Cinquaek" to run the "shortest line" to the promontory, called Watkin's Point. Referring again to 'Smith's' Map, (which was undoubtedly the guide for the King and Lord Baltimore, in defining the bounds of the province, as alleged by Lord Mansfield in his bill filed for the Penns: Bozman, Vol. 1, p. 107;) it will be seen that 'Watkin's Point' is distinctly delineated "near the river Wigheo," and that the "shortest line" from Cinquaek would strike the southernmost extremity of Watkin's Point.

It is clear to us that the point to which the line should run was this southernmost extremity of this headland, known as the Point. It corresponded exactly with Point Lookout on the western shore: See how St. Mary's Co. is laid out: Maryland St. p. 102.

Smith's Point having been substituted by compact for Cinquaek, the line runs to the place at Watkin's Point where the "shortest line" from Cinquaek in 1632 would strike it.

But now, for the first time, in running this "shortest line" we are met by one of the perplexities which gave rise to the controversy, submitted to your arbitrament. The lower part of Smith's Island seems to have been, for many years, under the jurisdiction of Virginia, and peopled by a few citizens of that State.

The evidence discloses, that there were two grants of 1000 acres each, one from Virginia, in October, 1667, and the other from Maryland, in 1679, the former calling for a divisional line where it entered the marsh from James Island, and the latter calling for a divisional line between the States. This is really, in our judgment, all the evidence of territorial definition in the line between the States, so far as Virginia's action is concerned.

The subsequent grant to Arcadia Melborne, and others, by Virginia, covering this and other land, was clearly void, as the title to this land had already passed out of Virginia to Henry Smith, and all of the land north of the supposed line of division, has been held by title derived from Henry Smith, and others.

Such a grant, therefore, of land, already patented, is void. It would be dangerous doctrine to maintain the vitality of a subsequent grant: *New Orleans vs. United States*, 10 Peters 731.

It will be remembered, that we have shown, that under this patent, the land on the west side of Smith's Island down to John Tyler's house at Hog Neck was in Maryland. That Hoffman, who lived there, had been a Justice of the Peace in Maryland, elected in 1853; that John Tyler is assessed for house and land and personal property in Maryland, and that Johnson Evans at Horse Hammock House, on the east side of the island, votes in Maryland, pays taxes in Maryland, and takes out license for his store in Maryland; so that the people living on the line from Horse Hammock are considered and reputed to be in Maryland by positive acts of citizenship.

But this line is more clearly and authoritatively defined by the action of Maryland, in laying off an election district in 1835—see report of *Handy, et al.*; Old Va. Ex. p. 287.

The southern line of that district is shown to have been a line from Horse Hammock, west to Sassafras Hammock, on the bay side: Cullin, Ex. p. 170, of *Va. old Ex.*

This line was confirmed by one of Virginia's witnesses, *Scriven*

Bradshaw, who affirms that it was renewed as an election district, in 1853: *Severn Bradshaw*, old Ev. p. 199.

John Tyler, living at Horse Hammock House, was a Maryland Justice of the Peace, as far back as 1835.

The voters, north of Horse Hammock, were registered in Maryland: *S. Bradshaw*, p. 200.

For confirmation of this line, reference is also made to the evidence last taken, pp. 38, 39, 40, 41, 42, 43, 47, 53 to 58, 63 and 107 and 109.

This seems to be the extreme claim of Virginia to the occupation of and jurisdiction over any part of Smith's Island. It is of little value in itself, the land is marshy, and the amount of taxes, derived from it, is very minute.

But whatever it is, it is a possession of Virginia, which interferes with the "shortest line across from Smith's Point to Watkins Point," and we must accept the situation.

The charter-line from Cinquack to Watkins Point on the maps of the present day, would not strike Smith's Island at all, and on Smith's map the island had no place, and was not in the contemplation of the King and Lord Baltimore at the time; and on Hermann's map, it was put far north of the line from Cinquack east to Watkins point; but on some maps the line would strike the lower part of the island. This doubtless gave rise to the impression, that the lower part of the island was in Virginia.

But this holding of Virginia stands in the way of the shortest line to the southernmost angle of Watkin's Point, where such line would strike, and as Virginia claims and insists on her right to the part of Smith's Island possessed by her, a line should run from Smith's Point to Sassafra Hammock, thence to Horse Hammock House, and then to Cedar Straits at the end of Watkin's Point, nearest to Smith's Point, and this would really be the line of Davidson and Lovitt, who comprehended the situation when they made it: *Last Ev. Drummond*, p. 17. A crooked line, but Virginia insists upon her right to the lower part of Smith's Island, based on her possession of it, and we cannot resist the title, so made by long possession.

PART III. THE LINE FROM WATKIN'S POINT TO THE OCEAN.

The charter calls for a right line from "Watkin's Point" to the ocean.

"Watkin's Point" is now known and defined, and looking at the map of Smith, it seems hard to understand, how there could be any difficulty about its true location.

But it was made a subject of doubt and disputation prior to 1668, and the call for the point, as calls for rivers and streams, trees and other sensible objects often do, was made the ground of uncertainty and controversy. The boundary between the United States and the British possessions, under the treaty of 1783, was defined by rivers and highlands between the waters, emptying into the Atlantic, and those which fall into the St. Lawrence. Years were spent in the effort to find the true St. Croix, which was the initial point of the line. Twice as many years were passed in establishing the real highlands, until at last the long-vexed north-eastern boundary was settled by compromise.

Watkin's Point was, as early as the 25th June, 1668, under the articles of agreement between Philip Calvert and Edmond Scarborough, Commissioners, acting for the respective Colonies concluded to be "*the point of land, made by the north side of, Pocomoke Bay, and south side of Anamesser Bay.*" The whole body of land lying between these two bays was designated and recognised as "*Watkin's Point:*" Md. Statement, p. 99.

After examining all that can be said on either side, there seems to be no doubt, that Bozman was correct in his conclusion also, that "Watkin's Point must have been the southern promontory of Somerset County, on the Bay, and what may be termed the ~~eastern~~ cape of Pocomoke Bay: 1 Bozman's Hist. Md. 132.

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And Gen. Michler himself came to the same conclusion, with all the light he could obtain : See Michler's Rep.; Rep. By. Line, p. 13.

Whatever part then of that "body of land" was nearest to Cinquack, so that the shortest line from the latter point across the Bay would strike it, should be the closing point of the line across the Bay : but the holding of the lower part of Smith's Island by Virginia, as we have seen, may compel the board to make a deflection in the line across the Bay, so as to take in this part of Smith's Island. Such a course, however, would bring the end of the Bay-line to the same point ; that is the southern extremity of Watkin's Point, nearest to Cinquack.

From that spot, then, a line due east to the Atlantic Ocean would comply *with the terms of the charter*, for the remaining link of the southern boundary.

It was maintained by the Maryland Commissioners, heretofore, that this "promontory" formerly extended to and embraced the southern end of Watt's Island. How far south this extended at the date of the charter cannot now be known, but the Maryland Commissioners claimed, that, by implication, from the terms of the Proclamation of Governor Harvey of Virginia on the 4th of October, 1638, this southern end of "Watkin's Point" was opposite to the "*River Wiconore, commonly called by the name of Ouancock, on the eastern side of the grand Bay of Chesapeake :*" and that an east line to the ocean from that spot was Maryland's true boundary on the eastern shore : Harvey's Proclamation, Md. Stat. 72.

But, *to-day*, the shortest line from Cinquack or Smith's Point, our recognised starting point, to Watkin's Point, would strike the latter at Cedar Straits, as may be seen by inspection of the map, compiled by De La Camp from the Michler Maps, in 1860.

And from that point by a right line east to the ocean, the southern boundary would run as called for by the charter.

This line as laid down in De La Camp's Map from Smith's Point to Cedar Straits, is also laid down on Hermann's Map of 1673, and on the map of John Thornton and Will. Fisher,

published between 1695 and 1700, and in the possession of the Maryland Historical Society, the Evans map of 1755, Pownall's map 1776, and on the maps accompanying Jefferson's notes in 1787, and this line is made to continue due east to the ocean in conformity with the terms of the charter. It seems clear from these maps, that when the compact was made in 1785, this was known to be the true southern boundary from Watkin's Point to the ocean.

It was supposed to be a water-line upon Pocomoke Bay, or River, as it was then alternately called. It ran from Cedar Straits, as it was intended, to the land of the eastern shore *in a straight line*, and until recently, (that is since 1856,) the maps "all placed the north shore of Pocomoke Bay so much too far to the north as in some degree to conceal" what now seems to have been the Scarborough Calvert line, which line in reality does not conform to the charter at all, as will be seen. Pocomoke Bay as laid down on Smith's map, ran west about twelve miles, and this water-line, therefore, could not be marked or shown by visible points, so that this line, as well as that on the Potomac, became a subject of consideration when the Commissioners were adjusting the compact of 1785, as the right of navigation and of property on Virginia shores had been reserved in the Constitution of 1776. As for instance, in the Constitution, "except the free navigation of the Potomac and Pocomoke, with the property of the Virginia shores or straits, bordering *on either of the said rivers*," &c.: Page 55 of Miscellaneous Docs.

And so in the compact, article 10, after speaking of "Piracies" on the Chesapeake Bay, &c., "or that part of said Bay where the line of division from the south point of Potomac River (now called Smith's Point) to Watkin's Point, near the mouth of Pocomoke River, may be doubtful, and on that part of Pocomoke River, within the limits of Virginia, or where the line of division between the two States *upon (not across)* the said river, is doubtful:" Miscellaneous, p. 55, A.

Maryland resisted, from the first, Virginia's claim to the Pocomoke, for in her convention on 30th October, 1776, she claimed

“almost the whole of the River Pocomoke, &c.: See Virginia *Documents* p. 9.

Now there could be no difficulty about the division-line “*across the river*” as now claimed, for it was only 100 yards wide: (Wise B. 118) and there are marks and boundaries on either side, but the provision was intended to apply to that central line through the river or bay, as now called, east from Cedar Straits to the main land.

Indeed, both Maryland and Virginia seemed to recognise this line upon the mouth of the Pocomoke River, for Maryland claimed “almost the whole river,” while Virginia claimed a part of it within her limits, but admitted that it was common territory: See Va’s Acts of Assembly from 1819 to 1866, Att’y-Gen’l Daniel’s Memorandum; Md. Resolutions of 1776; Va. Constitution 1776; Mis. Dois. 53; Northern and Western B’dy Doc. p. 9.

So it seems to have been understood at that early day, that the mouth of the river, or bay, as called, was held by the two States: the northern jaw by Maryland and the southern jaw by Virginia, while the fishing (shell-fish included) was common to the citizens of both states.

The binding effect of the Compact of 1785, cannot be doubted; for the Supreme Court thus recognises it: “the compact, made in the year 1785, between Virginia and Maryland was made by the two States, as States. The same power, which established it, was competent either to annul or modify it:” *City of Geo. Town vs. Alex. Can Co.*, 12 Peters 96.

It never has been annulled or modified, and it cannot be, except according to its own terms, by consent of both the States: See the acts of the States ratifying it.

But this claim on the part of Maryland to the holding of the northern part of the mouth of Pocomoke River is opposed by Virginia, because it alleges that such holding militates with the true construction of the agreement, made by Philip Calvert for Maryland, and Edmond Scarborough of Virginia, in 1668, heretofore referred to, and with the long continued acquiescence

of both the States in that agreement. It is conceded that the boundary line so settled, (as far as it was settled) by them as commissioners, and ratified by the colonies, cannot now be disturbed, except upon an allegation of mistake, which must be clearly made out: *Rhode Island vs. Massa.*, 4 Howard 591.

Nor ~~can~~ it be denied that Philip Calvert, on behalf of Maryland, and Edmond Scarborough on the part of Virginia, were empowered "*to determine the location of Watkin's Point,*" and to make the boundary line between the two colonies, running thence (that is, *from* Watkin's Point, not *across* it) to the ocean: Md. statement, 100.

It will be seen from several commissions referred to in the Maryland statement, pp. 91 and 92, that Maryland continued to claim down to 1668, to Watkins Point, being the "*north point of the Bay into which the river Wigheo, (formerly called Wigheocomico, afterwards Pocomoke, and now Wigheo-Comico again) doth fall exclusively.*"

And in erecting Somerset county on 22nd August, ~~1666~~, 1666, Lord Baltimore, in his letters patent thus describes its bounds, viz:

"All that tract of land within our province of Maryland, bounded on the south with a line drawn from Watkins Point, (being the north point of the bay, into which the river Wigheo formerly called Wigheocomoco, and afterwards Pocomoke, and now Wigheocomoco, again doth fall exclusively,) to the ocean on the east, Nanticoke River on the north, and the sound of the Chesapeake Bay on the west:" H. H., folio 268. Recorded in full in the records of Somerset County, in liber B., fol.; Maryland Documents, p. 1.

In the division of the county into hundreds, January, 1667, Annamessex Hundred is thus described, "Beginning at Watkins Point, running to the mouth of Merumusco Creek, up the westernmost side of the said creek, to Merumusco Dams, and from Watkins Point to the north point of Annamessix River," &c.: see Worcester, 1742; McMahon 91; Maryland Statement, page 92.

It is plain therefore, that Maryland claimed all the land, between the Annamessex down to Pocomoke Bay, as Watkins Point, up to 1668, and has occupied and covered, by her patents, all that territory down to the present time.

When Calvert and Scarborough came to fix the boundary-line on the eastern shore, they found it necessary to determine the true locality of Watkins Point, and having taken a full and perfect view of the point of land made by the north side of Pocomoke Bay and the south side of Annamessex Bay, concluded the same to be Watkins Point.

This, therefore, was determined to be the point from which an east line to the ocean should be run. The line was to run "from" this point, not over it. The commissioners say they run a line *from* the said point *over the Pocomoke River, &c., to the marsh of the seaside, &c., &c.*

It was necessary to determine also the place of departure of that line over the Pocomoke. If it began at a point on the same line of latitude as big Annamessix, it would be too high for Maryland; if it ran from the most southern part of Watkins Point, it might be deemed by Scarborough, too low for Virginia, and so to-day when its exact point of departure is found, it seems, as if by a compromise, they took a point mid-way between the extremes, and ran their line across Pocomoke River, from a point "*agreeable with, the extreme part of the westernmost angle of said Watkins Point,*" and this line has marks and boundaries to designate it, from the Pocomoke to the sea: Calvert and Scarborough agreement, Md. Statement, 99, 100.

These marks, east of Pocomoke River, were found by Michler, when making his survey in 1859: see Michler's Rep. Va. Boundary-line, p. 11. But says he, on page N, "No boundary-line marks of any kind were found *west of the Pocomoke*, and the inhabitants professed to be in ignorance of the existence of any." 13

If, then, our long adherence to the Scarborough Line on the main land is to be used against Maryland, the possession by Maryland of all that part of Somerset County down to Cedar Straits and bounded on the south by Pocomoke Sound, should

be conclusive in favor of Maryland, so far as the territory is in dispute.

It is conceded, that in cases like this, long-continued possession by a State, should go far to establish its title. Possession and general recognition of ownership go far to overwhelm traditionary reports, or the hearsay testimony, even, of the oldest inhabitants.

And the depositions of the witnesses, who seek to set up imaginary lines across Watkin's Point westwardly, are rebutted by the strong presumption growing out of the action of Maryland over all of Somerset County, and the acquiescence of Virginia in the same, even if our State did not stand on its impregnable ground under its charter and title from the king.

The "conjuror" Scarborough well knew, that the real "Watkin's Point" was the southern extremity of Somerset County, at Cedar Straits, and was the true initial point on the boundary-line; for it was the point where the closing line of the boundary, to wit, the "*shortest line*" from Cinquaack would strike "Watkin's Point;" but he knew, also, such line east to the ocean would curtail Virginia of much of its patented land, and so he was driven to the device of "concluding" the whole body of land aforesaid to be "Watkin's Point," and then dividing it, as before stated, the line was run "agreeable with" (concurrent with) the westernmost angle of the whole point. So, it ran "*from Watkin's Point*" to the ocean, but took a specific *part* of that point, with which an "agreeable" or "concurrent" line ran east of the Pocomoke River to the ocean. But west of the Pocomoke no line was run by them; no boundary marks made, and no agreement had; and from that day to this, Somerset County has held its *territorial* bounds along the north bank of Pocomoke Bay, or River, to Cedar Straits, and up Tangier Sound to the county's northern line: Bacon's Laws of Md., 1765, Somerset Co.; Michler's Report, p. 14.

And Virginia recognizes this to be the holding of Maryland for the last two centuries: see Wise Last Rep. p. 18, Ch. XI.

"The colony of Maryland, as a colony, also confirmed the

line run by Scarborough and Calvert. Maryland Council Proceedings, Libr. H. H. folio 268, show that in 1666, the county of Somerset was laid off on the eastern shore. Its limits then described by a line on the south drawn from Watkins Point, being the north point of that bay into which the River Wigheo (meaning the Pocomoke) empties, to the ocean on the east, &c." "This, in effect, was a line from what is called now Cedar Straits to the ocean on the east."

Such holding by Maryland is conclusive, in our judgment, of its right to Cedar Straits.

No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety, than in a case of disputed boundary: *Rhode Island vs. Mass.* 4 Howard 639.

To repeat this proposition: more than two centuries have elapsed since Maryland has claimed and held possession of and exercised jurisdiction over the whole tract known as Watkins Point, between Annapessex Bay and Pocomoke Bay on the north and south, and Tangier Sound and Pocomoke River on the west and east, and of such a possession without a paper title, the Sup. Court in the R. I. case said: "It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin."

That the whole of this point of land has been since 1666, considered part of Somerset County; that jurisdiction has been exercised by Maryland, its land assessed and taxes collected is undisputed, (both before and since the date of the Calvert Scarborough agreement,) and it should be considered by this board conclusive. Said the Supreme Court in *Handley's Lessee vs. Anthony*, 5 Wheat. 384. "It is a *fact of no inconsiderable importance in this case*, that the inhabitants of this land have

been uniformly considered both by Kentucky and Indiana as belonging to the last-mentioned State. No diversity of opinion appears to have existed on that point. "To cut the lower part of this point off and add it to ~~another~~, would not only disturb all its people and unsettle things, but it would work serious inconvenience to them in their relations with their state government.

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"It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned State, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the State on the opposite shore:" Same view at page 381 of 5 Wheaton.

By her charter-title and centuries of possession, Maryland, thus holding to the north line of the Pocomoke Bay, and Virginia to the south, the respective states hold to the middle of the bay or of the mouth of the river. This principle cannot be disputed.

"Where a river is the boundary between two nations or states, if the original property were in neither, and there be no convention respecting it, each holds to the middle of the stream: *Handleys vs. Anthony, &c.*, 5 Wheaton 374.

The same rule was laid down by Judge Story in the case of the Schooner *Fane*, in 3 Mason 149.

The use of a river or bay by the nations on either side of it, must repel the supposition of an exclusive right in either. The rule is, that each nation has a right to the "middle of the stream." Vattel, Book 1, C. 22, sec. 2. Angell on Tide-water, p. 7. Tyler on Boundaries, 234.

We have shown the use of Pocomoke River or Bay by both states. It was believed to be secured to both, by the Compact of 1785. Reference is asked to the evidence lately taken: Gillet, p. 8; *II. v. Johnson*, p. 19; Handy, pp. 53, 57 and 58.

We have maintained that Maryland holds to the Pocomoke under her Charter; but even admitting for the sake of the argument, that the Calvert-Scarborough line cut across Somerset County, Maryland's holding for two centuries down to the Pocomoke Sound, would give her a perfect title on the doctrine

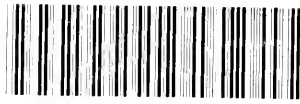
of usucaption or prescription, and precisely the same rules would apply, as if she held under her Charter. Her people occupied the land and appropriated the waters, and she is entitled to the middle of the Bay. When the Declaration of Independence was made, both the colonies were in the position of independent States, neither exercising exclusive jurisdiction over this Bay. They held to the middle of it. Vattel, B. 1, ch. 22, sec. 3.

In conclusion, we submit that Maryland has maintained conclusively, *at the very least*, a line of this character: Beginning at low-water mark at the divisional line between the two States of Virginia and West Virginia, upon the south-west coast or shore of the Potomac River; thence following the said River at low-water mark, to all wharves and other improvements now extending or which may hereafter be extended, by authority of Virginia, from the Virginia shore into the said river beyond low-water mark: and following the said river around said wharves and other improvements to low-water mark on the south-western side thereof; and following the said river in the same manner down to the easternmost angle of Smith's Point at the mouth of the said river Potomac, where it flows into the Chesapeake Bay, thence across the Chesapeake Bay to Sassafras Hammock on Smith's Island, then east to Horse Hammock house, thence to the centre of Cedar Straits, (which is the present Lovett-Davidson line,) thence through the centre of Cedar Straits to the middle of Pocomoke Bay, and along the middle of Pocomoke Bay to a point opposite the beginning of the Calvert and Scarborough line, and then east along said line to the ocean.

Establishing such a line as the true boundary, and securing to the citizens of each State equal rights in taking fish and oysters, in Pocomoke Bay, or Sound—which they have enjoyed from a period of time against which the memory of any living man runneth not to the contrary,—you will have discharged, we apprehend, your duty with singular fidelity to all the evidence in the case, and upon such clear and sound principles, that your award will commend itself to all the just and fairminded people of these contiguous and friendly Commonwealths.



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